United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7479

To be argued by
ROBERT M. CALLAGY

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

A. E. HOTCHNER,
Plaintiff-Appellee,

—against—

JOSE LUIS CASTILLO-PUCHE,
Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,
Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT DOUBLEDAY & COMPANY, INC.

Preliminary Statement

Defendant-Appellant Doubleday & Company, Inc. (Doubleday) submits this reply brief* in further support of its appeal and in response to the brief submitted by plaintiff-appellee A. E. Hotchner (Hotchner).

Hotchner's brief is a contrived and distorted statement of the law and the record applicable to this appeal. It ignores relevant controlling authority — including the Constitution — and attempts to pass off as controlling a number of decisions which predate the pivotal New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ruling. The most obvious failing of the brief is that although it purports to recognize the kind of evidence necessary for affirmance, it is absolutely devoid of any reference to evidence in this case sufficient to satisfy the substantive and Constitutional imperatives imposed upon a public figure in a libel action. The reason, of course, is that in this case, the evidence simply does not exist. This reply will attempt to demonstrate the more flagrant deficiencies which plague Hotchner's brief.

* References to the briefs are as follows: Hotchner, H. br.; Doubleday, App. br.; Amicus, Am. br. All other references and abbreviations are as cited in Doubleday's brief (App. br., p. 2).

ARGUMENT

As To Hotchner's Alleged Proof By Clear And Convincing Evidence That Doubleday Published With Reckless Disregard For The Truth*

Hotchner presented this Constitutional libel action to the trial court and jury as if it were a typical negligence case. Hotchner now wants this case reviewed by negligence standards. His citation of Judge Kaufman's opinion in Diapulse Corp. of America v. Birtcher Corp. 362 F. 2d 736 (2nd Cir. 1966), cert. dism. 385 U.S. 801 (1966) is misplaced. (H. br., p. 15). Diapulse was not a First Amendment libel action. The Constitutional guarantees mandated by New York Times v. Sullivan and its progeny were not at issue in that case. As Judge Kaufman's words made clear he was considering the role of an appellate court in passing on the propriety of a directed verdict.

The standard of review applicable here is the standard applied by this Court in Buckley v. Littell, 539 F. 2d 882 at 888 (2nd Cir. 1976) (App. br., pp. 6-7; Am. br., pp. 13-14, n. 5). Justice Stevens (then Judge Stevens) commenting upon this standard in Gertz v. Robert Welch, Inc., 471 F. 2d 801 at 807 (7th Cir. 1972) stated:

> "[T]he [Supreme] Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved. Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment." (Emphasis added)

As we have already noted (App. br., p. 9) and as the Court below held (342a), Hotchner failed to prove that Doubleday had published the material with knowledge that it was false. Consequently we now examine the evidence to determine whether it supports the claim of reckless disregard.

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* In reply to Hotchner's Point I (H. br., p. 15-27).

In his brief (H. br. p. 16-20), Hotchner accurately recites the kind of evidence which he was bound to establish in order to demonstrate that, prior to publication, Doubleday entertained "serious doubts" about the truth of the statements relating to Hotchner. After dismissing the Constitutional issues presented by Doubleday and Amicus as a "snowstorm of arguments" (H. br., p. 16), Hotchner states that if Doubleday entertained "serious doubts" as to the truth of the statements about Hotchner, this would constitute evidence of reckless disregard. (H. br., p. 17) He further indicates that evidence of "serious doubts" may be found if Doubleday had "obvious reasons to doubt the veracity of Puche or the accuracy of his writings" (H. br., p. 17), or if Doubleday "received information from an apparently reliable source that the matter was inaccurate, incomplete and in many respects totally false" (H. br., p. 20). Hotchner concludes his discussion of reckless disregard with the naked assertion that the "bold and inescapable fact is that Doubleday published with serious doubts" if it had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (H. br., pp. 26-27).

Doubleday does not dispute that this is an accurate statement of the law and of the proof required to demonstrate "serious doubts" prior to publication. Where, however, in this case is there any evidence of "serious doubts" on the part of Doubleday? Did Doubleday receive information from an "apparently reliable source" at any time prior to publication, that the statements about Hotchner were "inaccurate, incomplete and in many respects totally false" ? No, it did not. There is no evidence in the record about any informant, or that Doubleday ever received any such information.

Did Doubleday have "obvious reasons to doubt the veracity of Castillo-Puche or the accuracy" of his writings? Again, the answer is unequivocally no. Hotchner fails to offer any citation to the record, although he claims that the record establishes "obvious reasons" to doubt. Hotchner has failed to meet the Constitutional mandate,

by clear and convincing evidence, that Doubleday had "obvious reasons" to doubt the accuracy of Castillo-Puche or his writings. Instead, the converse is true.* The record demonstrates that Doubleday had more than reasonable justification to rely upon the excellent reputation of the Spanish author; (Exhibit 12, 219a-220a, Exhibits Q and R, 246a-248a) the established reputation of the Spanish publisher (which sold the translation rights to Doubleday); the documentary proof of Castillo-Puche's relationship with Hemingway (Exhibits 26, 7a Exhibits A, C, D, E, F, G, H, M, N, AA, AC, 9a-lla, Exhibit 12, 219a-220a); the fact that the Spanish work, in print for seven years without challenge, had been favorably received by critics (including a favorable treatment in the Saturday Review which first alerted Doubleday to the Spanish work (Exhibit P, 245a)); and the two favorable reports of the Spanish work, commissioned by Doubleday and obtained from independent Hemingway experts prior to Doubleday's acquisition of translation rights (Exhibits Q and R 246-248a). In this regard, it is significant that one report stated:

> "Castillo-Puche's reminiscenses ...have a sort of noble honesty clearly missing in Hotchner" (Exhibit Q, 246a; App. br., p. 13)

Although Hotchner demonstrates a knowledge of what the law requires, the record is devoid of any evidence of publication by Doubleday "with obvious reasons to doubt the veracity of the informant [the author] or the accuracy of his reports" (H. br., pp. 26-27). Hotchner's brief, in citing no evidence to the contrary, admits of this failure.

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* The full discussion of Doubleday's knowledge prior to publication appears in the main briefs (App. br., pp. 12-13, 20; Am. br. pp. 14-15, 17-19) and will not be repeated here. Hotchner's brief (H. br. p. 26) dismisses these pre-publication facts as "specious" argument, irrelevantly claiming that "the mere assertion by a defendant that it believed the matter to be true does not insure against liability".

What then does Hotchner offer to this Court as "evidence" that Doubleday published with "serious doubts" and with reckless disregard for the truth? Three Doubleday documents (Exhibits 7, 9 and 11, 212a, 214a, and 216a), the intent and meaning of which he has twisted and distorted throughout this litigation and for the first time in this case — a fourth document, Exhibit 10 (215a), which he has subjected to the ultimate in distortion.

Exhibits 7, 9 and 11 are fully discussed in Doubleday's main brief (App. br., pp. 4-6, 8-12, 16-17). Hotchner contends that Exhibits 7 and 9 establish that Doubleday had "serious doubts" as to the truth of the Hotchner statements. The New York Times decision makes clear that proof of publication of a libel per se, without more, does not meet the Constitutional standard. It follows that the evidence of publication with knowledge of falsity or reckless disregard must come from sources dehors the libel. In that regard the fact that Mr. Austin thought the material might be or was libelous of Hotchner is not proof that he or Mrs. Medina knew that the statements were false or that if they published them they would be acting recklessly, not caring whether the statement was true or false. Exhibit 11, Mrs. Medina's letter to Castillo-Puche, is not however mentioned in this regard. That letter goes to prove the exact opposite -- that Doubleday never doubted the accuracy of Castillo-Puche's opinions about Hotchner. Hotchner argues that Mrs. Medina and Mr. Austin's recognition in Exhibits 7 and 9 of uncomplimentary statements is synonomous with serious doubts concerning their truth. This contention simply does not hold water. These exhibits establish that the Spanish author's statements were recognized by Doubleday as derogatory. Such recognition, however, cannot be equated with serious doubts about the truth. This fact is clear from any fair reading of the exhibits, irrespective of the substantiating testimony of Mrs. Medina and Mr. Austin that they had no doubts concerning the truth of the statements referred to in the exhibits (360a, 361a, 375a).

Hotchner's brief glosses over the fact that Exhibits 7 and 9 resulted in the elimination and modification of eleven separate statements about Hotchner which appeared in the original Spanish edition (App. br. pp 4-5, 12; Am. br., p. 15). Obviously Hotchner recognizes that Doubleday's action in eliminating and toning down potentially troublesome language is inconsistent with "reckless disregard". Moreover, Mrs. Medina's testimony indicates that she was unequivocal in her belief that toning down the statements about Hotchner had cured any potential injury to his reputation (Exhibits 11 and 13, 216a and 221a). In writing to Castillo-Puche, to inform him of the toning down, she stated that the changes concerning Hotchner would eliminate the "risk [of] a libel suit [by Hotchner], or even a lot of unpleasantness in the American press". (Exhibit 11, 216a). Finally, Hotchner's brief totally fails to discuss or mention the letter received from Castillo-Puche after he had been informed by Mrs. Medina that his statements about Hotchner were being toned down. In this letter (Exhibit 12, 219a), Castillo-Puche reaffirms the truth of all of his comments about Hotchner and denies any intent to offend Hotchner (App. br. p. 12, Am. br. p. 15).

The fact that Doubleday believed that it had eliminated all possible libel of Hotchner, and that Castillo-Puche had confirmed the truth of his statements about Hotchner, is significant. The inquiry with respect to the New York Times standard "refers to the defendants attitude towards the truth or falsity of the material published" (Carson v. Allied News Co., 529 F. 2d 206 at 214 (7th Cir. 1976); H. br., p 17). The test is one which equates "reckless disregard of the truth with subjective awareness of probable falsity" (Gertz v. Robert Welch, Inc., 418 U.S. 323, 334-35, n. 6 (1974)).*

* Since Gertz v. Robert Welch, Inc., supra, at 348, requires that the defamatory statement must make "substantial danger to reputation apparent", the toning down did not make danger to reputation apparent to Doubleday and thus the statements are not actionable for this reason alone (See Am. br., p 18 n. 10).

Pointing to Exhibit 10, Hotchner for the first time argues that Doubleday's editor, Mrs. Medina, had a continuing concern about the Hotchner statements. To support this contention he argues that Exhibit 10 is a memorandum to "Bill" (Austin) (H. br., p. 20). This is an outright distortion of the document, as Hotchner's counsel knows. The word which Hotchner claims is "Bill" is really "Bell", referring to Hemingway's For Whom The Bell Tolls. Hotchner's attorneys had knowledge of this more than two years ago. At Mrs. Medina's deposition (3a, 42) they asked her questions about the exhibit, reading it themselves as "Bell":

> Q. [Mr. Rosenman] I show you a memorandum on blue paper headed "Bell" and ask you whether that is your handwriting
>
> A. [Mrs. Medina] Yes, it is
>
> [Exhibit 10 is marked as Exhibit J to Mrs. Medina's deposition]
>
> Q. Showing you plaintiff's Exhibit J, what does the first word "Bell" refer to, is that "For Whom the Bells Toll"?
>
> A. Yes
>
> Q. Is this a memo you wrote to yourself?
>
> A. Yes, it is
>
> * * *
>
> Q. I ask you what you meant by the words "Hotchner libel? - Gal. 41 and 79".?
>
> A. These are all notes to myself referring to galleys that I want to look at again. (transcript of Medina deposition, pp 37-38, 3a, 42)

Thus, not only did Hotchner's attorneys know the memorandum read "Bell"*, they knew it was not a memorandum addressed to Mr. Austin, but a note made by Mrs. Medina to remind herself to check that the eleven changes about Hotchner which she made in the

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* In this regard, see Exhibit 8 (213a) in which Mrs. Medina also refers to "Bell" (For Whom The Bell Tolls), and Mrs. Medina's testimony confirms this reference at page 31 of her deposition (3a).

manuscript (Exhibits 5A-G, 203a-210a) appeared in the galleys. This exhibit in fact demonstrates the extent of Doubleday's care. At trial, Hotchner's attorneys asked no questions of Mrs. Medina concerning Exhibit 10. Their present contentions with respect to Exhibit 10 exemplify their approach: distorting documentary evidence in an attempt to create evidence of the "serious doubts" that are so totally lacking in the record.

Exhibits 7, 9, 10 and 11 simply do not constitute evidence that Doubleday entertained "serious doubts" as to the truth or falsity of the statements about Hotchner. In light of Doubleday's removal, or toning down, of the eleven passages about Hotchner and its receipt, from the Spanish Author, of confirmation of the truth of the original statements, quite the opposite is in fact proved.

Other examples of Hotchner's distortion of the documentary evidence abound in his brief. For example, in the footnote on page 19, Hotchner quotes from the letter which Mrs. Lane sent to Mrs. Medina (Exhibit 17, 227a). Hotchner uses ellipses and "emphases supplied" in his attempt to give the words a meaning which they were never intended to have. His out-of-context quotations are patently misleading. The full quote from this letter reads as follows:

> "Moreover, I discovered that a large number of Castillo-Puche's comments about episodes in Hemingway's novels contained gross errors of fact — citations attributed to entirely the wrong book, and in one very troublesome case a total confusion of two characters in For Whom The Bell Tolls (Agustin and Andres), so that C-P's [sic] remarks, especially page 257, simply do not apply at all. Groan! I am afraid C-P [sic] will have to be asked to rewrite to make his elucubrations on the bullfight metaphor in For Whom fit the novel here. Groan! (Exhibit 17, 227a)

The "gross errors of fact", which Hotchner would have this Court believe refer to statements in the Book about Hotchner, in fact refer to comments about episodes in Hemingway's novels: either improper citations to Hemingway's works, or confusion of

two characters who appear in Hemingway's For Whom The Bell Tolls, matters which are totally unrelated to Castillo-Puche's ability to report accurately and reliably his observations of Hotchner. Mrs. Medina confirmed this fact at trial (351a).

Similarly, Hotchner's brief, at page 20, extracts the quote "get at Hotchner" from Mrs. Medina's letter to Castillo-Puche (Exhibit 11, 217a). Had Hotchner fairly excerpted the quote it would have continued:

> "He's [Hotchner] just not important enough as a character in the story you are telling to risk, it seems to me, a libel suit, or even a lot of unpleasantness in the American press ...,"

Mrs. Medina testified, and a complete reading of her letter establishes, that she was of the opinion that despite her elimination or toning down of the statements about Hotchner, Castillo-Puche's opinion of this minor character would, in an inoffensive way, be conveyed nevertheless to the reader. The trial court also recognized the fact that Doubleday tried to avoid libeling Hotchner (406a).

Hotchner's reliance on this Court's statement in Buckley v. Littell, supra (H. br., p. 19) misapprehends the import of the Court's language. In Buckley, this Court states that the publisher's concern should have been a "red flag" to Littell. It should, of course, have been a red flag to Littell because Littell was the author and not the publisher. He, unlike the publisher, should have known whether his statement was true or not. In this case the publisher (Doubleday) itself insisted upon eleven significant changes in the manuscript, and obtained a confirmation of truth from the author with respect to all of the statements about Hotchner.

Hotchner's brief goes on at great length (H. br., p. 21-22) arguing that the statements about Hotchner were not "hot news". Doubleday has never contended that the statements were hot news, nor does it deem the point relevant. Any meaningful inquiry must concentrate on Doubleday's attitude toward the truth or falsity of the statements. If there was no reason to suspect the truth, the inquiry ends. Doubleday

never entertained any serious doubts about the Book's veracity. In this regard, however, Hotchner contends (H. br., p. 21) that Doubleday's investigatory failure is proven since no Doubleday employee read Papa Hemingway. As an initial matter, it would be prohibitive and "chilling" to require a publisher to read the substantively related works of every minor character (like Hotchner) whose name incidently appeared in one of its books. In addition, as was previously mentioned, Doubleday independently obtained two reports from qualified Hemingway experts prior to obtaining rights to the Book. One report specifically preferred the Book's "noble honesty", a characteristic it claimed was clearly missing in Hotchner's Papa Hemingway (Exhibit Q, 246a). Moreover, both Mrs. Medina (in editing) and Mrs. Lane (in translating) the manuscript consulted Ernest Hemingway : A Life Story, Carlos Baker's definitive Hemingway biography* (Exhibit 8, 213a, Exhibit 16, 226a). Thus, Doubleday has met even Hotchner's standards for publication.

Hotchner contends throughout his brief that Doubleday had knowledge of Castillo-Puche's alleged ill will towards him. He utilizes constantly changing synonyms (animus, hatred, antipathy, etc.) in an attempt to disguise the utter repetitiousness of this irrelevant argument. We have previously discussed that even if Doubleday did have this knowledge, it is at the very most Constitutionally insufficient to sustain a finding of reckless disregard for the truth. (App. br., pp. 10, 18). As we also state, supra, at page 6 and as Hotchner's brief acknowledges (H. br., p. 17), reckless disregard turns on

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* In this regard, five out of the twelve references to Hotchner contained in Carlos Baker's index relate to Hotchner's exploitation of Hemingway (67a, 69a, 70a, 73a and 74a).

the defendant's attitude toward the truth or falsity of the statements, and not on the defendant's animosity toward the person defamed*. (See e.g. Gertz v. Robert Welch, Inc., supra; St. Amant v. Thompson, 390 U.S. 727 (1968); Carson v. Allied News Co., supra, at 209, 214). Of course, Hotchner's ill will argument is one further step removed from this standard, because it is not Doubleday's ill will that is at issue (Doubleday endeavored to avoid injuring Hotchner), but Doubleday's alleged knowledge of Castillo-Puche's ill will. Hotchner has not and cannot introduce one iota of authority — from any year or jurisdiction -- which suggests that a publisher's awareness of an author's low regard for his subject is evidence, let alone a sufficient basis, to support a finding of the publisher's reckless disregard for the truth.

In any event, even if it could be said that Doubleday did have knowledge of the author's ill will toward Hotchner, armed with this knowledge, Doubleday wrote to Castillo-Puche who responded and confirmed the truth of the original statements, but agreed to a toning down because, in his words, he had "no interest in offendering [sic] Mr. Hotchner" (Exhibit 12, 219a; App. br., p. 12). Doubleday then toned down the statements about Hotchner, sent the revised manuscript pages to him for his review and then, prior to publication, had the revised manuscript read twice by the copy editor.

The only evidence which Hotchner introduced with respect to Doubleday's alleged knowledge of ill will was the prejudicial Purczinski translation which we have previously discussed (App. br., p 35-36) The Purczinski translation was offered to prove that " the words in the original Spanish Work as read by Doubleday's agent Lane put Doubleday on notice of the hatred of Puche towards Hotchner" (H. br., p 35). In spite of this fact, we know how Mrs. Lane translated the statements which the jury found to be

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* Indeed, it is because the inquiry concentrates on the defendant's attitude towards the truth or falsity of the statements that it was reversible error for the trial court not to permit Doubleday to inquire into events after 1960, which might have effected an opinion about the Hotchner-Hemingway relationship (App. br., Point IV).

libelous, since these statements are all contained on the manuscript pages which Mrs. Medina submitted to Doubleday's Contract's Department for review. (Exhibits 5a-5g, 203a-210a) Furthermore, it defies logic to assume that which is essential to Hotchner's contention -- that Mrs. Lane would translate the Spanish in exactly or approximately the same manner as Purczinski. For example, from the Spanish "vagabundo" Purczinski translated, not Mrs. Lane's "ringmaster", but an assertion that Hotchner looked "like one of the leaders of the New York or Chicago gangs"* (Exhibit 30, 233a). The obvious question raised by Purczinski's translation is why he did not select Detroit, or Madrid, or Paris, or even Poughkeepsie? The answer may be found in the fact that the Professor was not qualified to translate, or to testify as an expert. At trial it was established that unlike Mrs. Lane, Purczinski had never translated a book from Spanish to English, been employed as a literary translator by a publisher, or lived in Spain. He had only infrequently visited it, and he had no personal knowledge of the colloquial terms used by Castillo-Puche (which he had translated with the help of unnamed third persons and dictionaries). He admitted that, even among qualified experts, there is room for disagreement as to the English equivalent of colloquial Spanish, and he testified that he translates accurately until he comes to uncomplimentary passages about living persons, which he declines to translate (262-268a).

Moreover, there was no evidence that Mrs. Lane was Doubleday's agent, or even if she was, that it would have been within the scope of her duties to report (assuming she so translated) the more offensive Purczinski language. All the evidence as to Mrs. Lane's relationship with Doubleday establishes that she was an independent contractor: she operated an independent business Hexamer v. Webb., 101 N.Y. 377, 4 N.E. 755 (1886), Ostrander v. Billie Holm's Village Travel, _ Misc. 2d _, 386 N.Y.S. 2d 597 (D.C. Suff. Co. 1976), possessed a special skill (349a) Kueckel v. Ryder, 54 App. Div.

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* Interestingly, Carlos Baker in his definitive work on Hemingway, says that Hemingway joked with Hotchner "about his freckled face and gangster slouch" (68a).

252, 66 N.Y.S. 522, (lst Dep't. 1900), aff'd 170 N.Y. 562, 62 N.E. 1096, maintained her own tools and working premises, Shapiro v. Rabicoff, 316 F. 2d 262 (2nd Cir. 1963), and had a contract with her principal for a definite "project" (349-50a) Shapiro, supra. Furthermore, the correspondence excerpted by Hotchner (H. br., p. 25) to demonstrate Doubleday's alleged "control" does not relate to Mrs. Lane's duties as a translator. Likewise, even if she was Doubleday's agent, the only evidence as to the scope of her duties was that she was to translate the Spanish edition into literary English in the most accurate and readable manner of which she was capable. (Exhibit T, 249a; Ct. Exhibit 2, 196a) .

In this regard, Hotchner's reliance (H. br., p.22) on Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920), is misplaced. The facts in that case show that the agent, Howland, was intimately involved with the writing and preparation of the published material. The dedication of the work, "To Hewitt Hansom Howland, the Second Father of this Book", Id. at 71, is a clear demonstration of this fact. As is demonstrated at page 36 of our main brief, Corrigan supports Doubleday's position that even if Mrs. Lane had translated the Book in a manner similar to Purczinski, it would have been outside the scope of her duties, as a translator into literary English, to report more offensive language to Doubleday.

Hotchner's argument - that Mrs. Lane did, or should have, translated the portions of the Book describing Hotchner as Purczinski did, and should therefore have have made comments to Doubleday about those passages — is blunted by the fact that prior to translation two qualified experts commissioned by Doubleday to review the Spanish edition likewise found no cause for comment. Thus, other than the fact that the Lane translation was uncomplimentary, there is no evidence in the record of Doubleday's alleged knowledge of Castillo-Puche's ill-will toward Hotchner.

Hotchner has seemingly abandoned the argument (since his brief makes no mention of it in relation to "actual malice") which he consistently paraded before the jury — that alleged, innocuous inaccuracies, related, not to Hotchner but to incidents that Doubleday had no reason to question, are evidence of publication with reckless disregard. We have previously discussed the irrelevency and prejudicial nature of this testimony (App. br., pp 5, 17, 37-38).* The approach taken by Hotchner in his brief with respect to the record on this point however, merits comment.

Hotchner's statement of facts (H. br., pp. 1-15) and accompanying "Schedule" (H. br., pp. 60-64), are misleading compilations of contorted facts, misinterpreted testimony, and out-of-context quotations. They seek to buttress Hotchner's attempted portrayal of the Book as a "Clifford Irving" fabrication. In seeking to substantiate his distorted portrait of the Book, Hotchner takes free license with the Spanish author's words and with the statements of several trial witnesses. Examination of only a few of Hotchner's alleged "inaccuracies" demonstrates most effectively the extraordinary liberties taken by Hotchner in manufacturing and manipulating these inaccuracies.

For example, in item "A" of Hotchner's Schedule it is asserted that although Mary Hemingway testified that her husband shot himself with a shotgun, the Book (Exhibit 1, 6a, p. 1) says that he shot himself with a rifle. Close reading of the text, however, discloses that the Spanish author's words have been taken out of context. The Book states that Castillo-Puche, while listening to his transistor radio in Spain heard a broadcaster announce that Hemingway had "accidentally killed himself while cleaning a rifle". The Book goes on to state that the only question in the Author's mind was "which shotgun or rifle he had killed himself with (Exhibit 1, 6a, p. 1, emphasis added).

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* None of these alleged inaccuracies relate to Hotchner, nor are they in any way relevant to the issue of Doubleday's attitude toward the truth of falsity of the Spanish author's statements concerning Hotchner.

Hotchner's item "B" asserts that Mary Hemingway testified that her husband brought no shotgun back from Spain on his last trip. Quite the contrary, Mary Hemingway testified, not that Hemingway did not bring any shotguns back, but that she did not recall whether or not he had brought shotguns back (563t).

A similar device is frequently employed by Hotchner to substantiate other contentions of "inaccuracy". The fact that a particular witness testified that he or she did not remember an event, hear a statement or recall a conversation is claimed by Hotchner to prove that such events, statements and conversations never occurred. (See, e.g. "H", "O", "CC").

A third technique utilized by Hotchner is the quoting of an incomplete portion of a witnesses' testimony. In item "C" of the Schedule, in an effort to prove that Hemingway owned no automatic rifles, Hotchner cites Mary Hemingway as saying that her husband was a foe of automatic rifles. The trial transcript indicates, however, that she answered, as well, that he had something like a dozen rifles, one of which may have been an automatic (563t).

Further, Hotchner has relied upon unsupportable inferences to buttress some of the alleged "inaccuracies" of the Book. In item "D", for example, Hotchner impliedly concludes that it is impossible that Hemingway could describe his son Patrick, a cum laude graduate of Harvard,as "a bit thick between the ears". The flawed character of such an assumption is, of course, obvious.

Statements contained in Hotchner's own work, Papa Hemingway*, likewise undermine his "fabrication" thesis. Item "K" alleges that the Book is inaccurate because Ernest Hemingway would never say, as the Book reports he said: "where do you suppose their maidenheads went?" As proof of Ernest's pristine tongue Hotchner offers his own testimony that Hemingway's language was "one of politeness", and the testimony of

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* References are to the paperback edition of Papa Hemingway (Exhibit 28, 7a).

Hemingway's widow, that she never heard him be coarse or crude (RR). Yet in Papa Hemingway, Hemingway is quoted by Hotchner as saying "shove them up his ass" (p. 240), "Black-Ass" (p. 118), "goddamn" (pp. 108, 115, 275, 294), "bastards" (p. 119) and "son-of-a-bitch" (pp. 108, 115, 275, 294). In one sequence, when asked to suggest a new title for a film, he is quoted as saying:

> "Well, then, here it is: F as in Fox, U as in Universal, C as in Culver City and K as in R.K.O." (p 109).

At trial, Hemingway's daughter-in-law Valerie testified (QQ) that rather than use words like "make out", Hemingway would have used a word beginning with "f" (466-467t). A third source, Carlos Baker, quotes Ernest as saying "how shitty" (65a) and "shit-maru" (69a).

In item "NN" Hotchner challenges the accuracy of the Book's description of the injury Ordonez received, during the Pamplona bull-run, as a "little scratch". Hotchner's reliance on the Schoonmaker testimony — that she recalled Ordonez having an injury which required a surgical drain — is misplaced. From Hotchner's own biography it is clear that Schoonmaker's testimony referred to the bull-wound Ordonez received later that same summer. This second injury was described in Papa Hemingway as "still discharging" when Ordonez got out of the hospital (p. 244) (Compare Hotchner's descriptions of the two injuries in Papa Hemingway: pp. 237 (1st injury, at Pamplona) and 243-44 (2nd injury, at Palma de Mallorca)).

Many statements in the Schedule challenge the Book's claim that Hemingway was rowdy during the week at Pamplona. Yet Carlos Baker states: "In fact his [Hemingway's] behavior at Pamplona and in the weeks ensuing was aggressively adolescent (60a), and Papa Hemingway, at p. 235, states that Hemingway participated in: "an all-night revel of dancing in the streets and singing and drinking in the cafes."

Space does not permit an analysis and exposure of each item contained in the Schedule. If the Court will look closely at the claimed inaccuracies, however, it will become apparent that Hotchner's argument concerning "Clifford Irving Puche" is the sole fabrication. This conclusion is reinforced by the fact that three independent reviewers, critiquing the Spanish work in this country, considered it creditable.

In conclusion, when the obfuscation of Hotchner's brief is exposed, it is clear that Hotchner's attempt to prove that Doubleday had a reckless disregard for the truth failed as a matter of law.

As To The Statements Held Libelous By The Jury*

Hotchner's contention notwithstanding (H. br., p. 27), Doubleday and Amicus do contend that the statements held libelous at trial do not constitute libel per se (Am. br., pp. 18-19, n. 10). Doubleday argues in the alternative, however, that even were such statements to be treated as libelous per se, five out of the six (the sixth statement is discussed in detail in Doubleday's main brief, (App. br., p. 27)) would nevertheless constitute protected speech under the "fair comment" doctrine. By failing to refute or even address this contention, Hotchner himself recognizes and as much as concedes this point.

Point II of Hotchner's brief is filled with irrelevant and inapposite authority. No attempt will be made to distinguish it. A few matters do, however, require clarification. Appellee has argued that the publication involved in Buckley v. Littell, supra, unlike that involved in the instant case, concerned a matter of public interest. However, it has been held in this case that Hotchner is a public figure, a ruling which he himself has never objected to. Moreover, inasmuch as Hotchner claims to be Hemingway's Boswell, his relationship to Hemingway — one of the most popular and influential writers of the 20th century — is clearly a matter of public interest and concern.

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* In response to Hotchner's Point II (H. br., pp. 27-29)

A comparison of the "political labels" held in Buckley to constitute protected "opinion" with the alleged libelous epithets contained herein is revealing. Can it reasonably be argued that terms like "hypocrite", "toady", or "exploiter of reputation" applied to Hotchner are any less matters of opinion than the terms "fascists", "radical right", or "fellow traveler", applied to William Buckley?

Finally, while it may be generally true that courts have not strained to interpret commentary in its mildest and most inoffensive manner, the most recent authority concludes otherwise. In James v. Gannett Co., Inc., 40 N.Y. 2d 415, 386 N.Y.S. 2d 871, _ N.E. 2d _ (1976), and Buckley, supra, statements which had been held defamatory at trial were re-examined and found to be non-actionable.

It is clear therefore that five out of the six statements held at trial to be libelous constitute protected speech under the First Amendment, and that the decision of this Court in Buckley must control the issue.

As To Hotchner's Invasion Of Privacy Argument*

We have previously demonstrated (App. br., pp 29-34) that Hotchner and the trial court misunderstood the basis for an action by a public figure for invasion of privacy under Section 51 of New York's Civil Rights Law (N.Y. Civ. Rts. Law §51 (McKinney 1976)). Indeed, the fact that Hotchner's brief (H. br., p. 31) contends that Doubleday overlooked Time, Inc. v. Hill, 385 U.S. 374 (1967) in arguing that "the common law of New York recognizes no right of privacy" exemplifies this misunderstanding.

New York does not recognize a common law right of invasion of privacy. All claims must meet the statutory requirements of Section 51. (App br., p 30; Mecropol v. Nizer, 381 F. Supp 29 at 38 (S.D.N.Y. 1974); Hill v. Hayes, 18 App. Div. 2d 485, 240

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* In response to Hotchner's Point III (H. br., pp. 30-34)

N.Y.S. 2d 286 (1st Dep't. 1963). Section 51 provides that the use of the plaintiff's name or picture must be for "advertising purposes or for purposes of trade". Where the publication is an advertisement or the use involves an attempt to sell or promote, the "advertising" or "purposes of trade" requirements have been met.

However, when a person's name is used not in an advertisement, but in a publication which concerns a matter of public interest, it is required that the account be infected with material and substantial falsification and published with knowledge of falsity or reckless disregard for the truth* (Spahn v. Julian Messner, Inc., 21 N.Y. 2d 124, 286 N.Y.S. 2d 832, 233 N.E. 2d 840 (1967) D'Altomonte v. New York Herald Co., 208 N.Y. 596, 102 N.E. 1101 (1913); Sidis v. F-R Publishing Corp., 113 F. 2d 806, cert. den. 311 U.S. 711 (1940)). In addition, to satisfy the "purposes of trade" requirement, one must establish that the use of the name was material and substantial and not incidental. Thus, Judge Tyler in Meeropol v. Nizer, supra, stated:

> "Plaintiffs are not entitled to recover for an invasion of privacy because references to them as the Rosenberg children are highly incidental to the main purpose and subject of the book. Twenty-nine isolated references of a fleeting and peripheral nature are insufficient to support a claim under §51." Id. at 38.

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* We have previously noted (App. br., p. 34) that Hotchner failed to prove these elements.

Hotchner, a very minor and obscure figure in a book about Hemingway, is mentioned a total of 17 times on 15 of the Book's 388 pages* (App. br., p. 34). Despite Hotchner's statement to the contrary (H. br., p. 2) the Pamplona episode is only given specific treatment in a chapter and a half of the Book, and no mention of Hotchner was even made until page 82.

Hotchner's brief totally fails to address the crucial legal point made by Doubleday (App. br., pp. 31-34) that Spahn, supra, Koussevitzky v. Allen, Towne, & Heath, Inc., 188 Misc. 479, 68 N.Y.S. 2d 779 (Sup. Ct. N.Y. Co. 1947), aff'd 272 App. Div. 759, 69 N.Y.S. 2d 432 (1st Dep't. 1947), and Time Inc. v. Hill, supra, involved articles or books that were primarily about the respective plaintiffs, and that no New York case has held that Section 51 applies to a merely incidental use of a person's name. Meeropol v. Nizer, supra; University of Notre Dame Du Lac v. Twentieth Century- Fox Film Corp., 22 App. Div. 2d 452, 256 N.Y.S. 2d 301 (1st Dep't. 1965), aff'd 15 N.Y. 2d 940, 259 N.Y.S. 2d 832, 207 N.E. 2d 508 (1965). In this connection, see also Damron v. Doubleday, Doran & Co., Inc., 133 Misc. 302, 231 N.Y.S. 444, (Sup.Ct. N.Y. Cty 1928) aff'd 226 App. Div. 796, 234 N.Y.S. 773 (1st Dep't. 1929); Stillman v. Paramount Pictures Corp., 2 App. Div. 2d 18, 153 N.Y.S. 2d 190 (1st Dep't. 1956), aff'd 5 N.Y. 2d 994, 184 N.Y.S. 2d 856, 157 N.E. 2d 728 (1959).

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* Hotchner's citation (H. br., p. 33, f.n.) of Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973) as authority that "one unauthorized photograph in a magazine of over a hundred pages is enough to impose liability" further exemplifies his total lack of understanding of Section 51. The issue in Grant was whether a summary judgment in favor of the defendant should be denied to permit Cary Grant to conduct discovery to establish that the article in which his photograph appeared was in fact an "advertisement in disguise". If it was an advertisement, than the requirements of Section 51 were met. Similarly, that Newsweek Magazine, in reviewing the Book, made reference to Hotchner does not satisfy the "purposes of trade" requirement of Section 51.

Hotchner continues his reliance on cases from other jurisdictions or cases applying other law which have no bearing on actions for invasion of privacy under Section 51. (e.g. Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) applying Ohio or West Virginia common law; Nader v. General Motors Corp., 25 N.Y. 2d 560, 307 N.Y.S. 2d 647, 255 N.E. 2d 765 (1970) applying by stipulation the commom law of the District of Columbia; Varnish v. Best Medium Publishing Co., Inc., 405 F. 2d 608 (2nd Cir. 1968) cert. den. 394 U.S. 987 (1969), (applying Pennsylvania common law.)*

To the extent that Hotchner claims that in New York there has been an "expanding recognition of invasion of privacy actions" (H. br., p 31 f.n.), Judge Tyler's opinion in Meeropol v. Nizer is again dispositive:

> "In an attempt to circumvent the limitations of §51, plaintiffs claim that a new common law right to privacy has been established in New York. See, Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), aff'd. and mod. on other grounds, 487 F. 2d 986 (2nd Cir. 1973). The courts in New York have consistently held that an action for invasion of privacy is exclusively statutory. [citations ommitted]. Assuming the Gallela case recognized a right of privacy beyond the statutory grant, the court limited its decision to an extreme situation involving abusive, physical intrusion, which is not presented here (381 F. Supp. 29 at 38).

The cases cited by Hotchner in his footnote either do not relate to New York law or involve cases where the requirements of Section 51 were met.

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* Note that Hotchner's brief (H. br., p. 34) states that Varnish rejected the arguments made by Doubleday, including the cases relied on by Doubleday. The Varnish opinion is carefully identified as being by Chief Judge Lombard of the Second Circuit. Hotchner's brief does not point out however, that Varnish was an action brought under Pennsylvania's common law right of privacy. Instead, it leaves this Court to assume that the case did involve New York law — the law which Hotchner's brief is purportedly discussing.

Finally, although irrelevant to the incidental use of his name, to the extent that Hotchner claims (H. br., 6, 32) that remarks are specifically attributed to him in the Book, he is in error. Only one minor statement was in fact attributed to him*, and at trial Hotchner's counsel was asked to point out any such remarks and was unable to do so (641-42t).

As a matter of law, the invasion of privacy count should have been dismissed.

As To The Award Of Punitive Damages
In The Amount Of $125,000**

Doubleday and Amicus do not contend, as Hotchner claims, that punitive damages may not be awarded to a public figure in a libel action. Doubleday and Amicus do believe that this would be the better rule, that there is authority to this effect, and that the award in this action in the amount of $125,000 demonstrates that the concern expressed by this Court in Buckley, and by the Supreme Court in Gertz is well founded (App. br., pp. 41-43; Am. br., Point II). However, and irrespective of all the other failures of proof by Hotchner in this action, Doubleday (and Amicus) contend that Hotchner is not entitled to punitive damages in this action because (1) he has failed to prove any common law malice or ill will on the part of Doubleday as required by New York substantive law (App. br., Point V; Am. br., p. 34 n. 19); (2) under Constitutional

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* In this regard, Hotchner's repeated protestations that he spoke or understood no Spanish (H. br., e.g. p. 6, 32) seem incredible since he claims to have traveled extensively with Hemingway and his Spanish speaking entourage in Spain. Surely he would have picked up some Spanish. The only words attributed to him in the whole Book appear on page 198(1a): "And 'Freckles' said, in his halting Spanish, 'He's [Ordonez] the best matador in the whole country.'" Similarly, his contention that Castillo-Puche understands and speaks no English seems unlikely since Castillo-Puche was a Spanish correspondent to the United Nations in New York and even covered a United States presidental convention and campaign (604t).

** In response to Hotchner's Parts V and VI (H. br., pp. 41-58).

and New York standards the amount of punitive damages must bear some reasonable relationship to the nature of the defendant's act, the vituperative nature of the words spoken, and the harm actually inflicted* (App. br., Point VI; Am. br., Point IIA) and (3) based on the proof in this record the award of punitive damages in the amount of $125,000 is outrageously excessive (App. br., supra; Am. br., supra).

Hotchner's brief, implicitly concedes that there is no evidence of ill will or common law malice on the part of Doubleday. (H. br., p 43) Indeed, even the trial court so ruled (406a; App. br., p 46). Instead, on the basis of an 1897 case, it argues that no proof of ill will is necessary. Hotchner either totally ignores the New York authority cited by Doubleday (App. br., pp. 43-46) and Amicus (Am. br., p. 34 n. 19) to which this Court is again referred, or it misconstrues the controlling authority. Thus, on page 43 of his brief Hotchner states that Clevenger v. Baker Voorhis & Co., 19 App. Div. 2d 340,

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* Although not always specifically stated, the rule which has permeated every federal decision which has sustained an award of punitive damages to a public figure or public official, especially since Gertz, was succinctly stated by the Supreme Court of Appeals of West Virginia in Sprouse v. Clay Communications, Inc., 211 S.E. 2d 674 (1975):

> "Under the recent U.S. Supreme Court case of Gertz v. Welch, supra, it is permissible for a plaintiff in the position of Sprouse to recover punitive damages because of the high standard of proof required for a candidate for public office to sustain any action for libel. As it is necessary for a candidate for public office to prove that false or misleading statements were published with knowledge on the part of the publisher of their falsity or with wilful and reckless disregard for their truth, and further to prove that they were published with a deliberate attempt to injure, punitive damages may be received". (Id. at 692) (Emphasis added)

This is also the law in New York.

243 N.Y.S. 2d 231 (1st Dep't. 1963), aff'd 14 N.Y. 2d 536, 248 N.Y.S. 2d 396, 197 N.E. 2d 783 (1964), stands for the proposition that punitive damages cannot be awarded because of a failure by plaintiff to prove "actual malice". Hotchner's obvious intent in using quotation marks is to attempt to pass off the "actual malice" referred to in Clevenger as the Constitutional "actual malice" which does not require proof of common law malice. As a review of Clevenger establishes, the "actual malice" which the Appellate Division and Court of Appeals referred to was common law malice. Thus, the district court in Buckley quoted Clevenger for the proposition that before punitive damages can be awarded under New York substantive law, the publication must be with:

> "a desire to harm the plaintiff, or where the publication is so recklessly made as to indicate a heedless disregard for the rights of others." (394 F. Supp. at 945) (Emphasis added)

What Hotchner wants is to have the constitutional "reckless disregard" standard serve him double duty. Evidence of constitutional "reckless disregard", as we have previously discussed, refers to the defendant's attitude toward the truth or falsity of its statements (supra, p. 6). Hotchner's failure of proof in this regard has been established. Even assuming, for purposes of argument, that it had not been so established, the very most the jury could have found in this case was constitutional reckless disregard. On the other hand, common law malice refers to the defendant's attitude towards the rights of the plaintiff, Carson v. Allied News Co., supra, at 206. In this action, there was no evidence that Doubleday exhibited any "heedless disregard for the rights" of Hotchner. As the trial court stated: "quite the contrary" was true, as Doubleday" was anxious not "to . . . get at Hotchner"* (406a). Thus, even if, arguendo,

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* In this regard, throughout his brief (e.g. H. br., pp. 20, 47) Hotchner attempts to distort Mrs. Medina's words: "to get at Hotchner" (Exhibit H, 217a). Even the trial court recognized that these words had a meaning exactly opposite to that which Hotchner had attributed to them. It is this recognition by the trial judge which makes submission of the punitive damage issue to the jury so inconsistent and contradictory.

the jury had sufficient grounds upon which to find constitutional "reckless disregard" for the truth, it could not, as a matter of law, have found common law reckless publication.

Even Reynolds v. Pegler, 223 F. 2d 429, 434 (2nd Cir. 1955)* required a finding of publication with common law malice. In Pegler, this Court stated, as quoted by Hotchner (H. br., p. 44):

> "Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights". (Emphasis added)

Again, this Court is referring to common law malice -- the defendant's attitude of "indifference to plaintiff's rights". In addition to the fact that Reynolds, unlike this action, involved an infamous personal attack, the "violence and vituperation" of the statements cannot be compared to the statements at issue here (App. br., pp. 15, 49). Hotchner does not, and cannot, contend that Doubleday failed to "exercise editorial supervision". With respect to the statements about Hotchner, it is clear that there was "investigation, delay, and ... alterations." The evidence concerning the toning down of eleven statements about Hotchner, including the total elimination of five from the original Lane translation of the Book is uncontradicted (e.g. App. br., pp. 10-12, 16, 27-28). Doubleday believed that these modifications eliminated any possibility of libel to Hotchner (Exhibit 11, 217a). Thereafter, Mrs. Medina sent these changes to Castillo-

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* Reynolds of course, was decided 10 years before New York Times v. Sullivan, and this Court in Buckley did not even cite Reynolds in its discussion of the propriety of awarding punitive damages to a public figure in a libel case.

Puche and received from him a confirmation of the truth of the original statements (Exhibit 12, 219a; App. br., p. 12). Thus, the common law malice requirement set out in Reynolds, "wanton or reckless indifference to plaintiff's rights", is in conformity with New York law and is totally absent in this case.

Hotchner cites Buckley v. Littell, supra; Davis v. Schuchat, 510 F. 2d 1026 (4th Cir. 1976) and Appleyard v. Transamerican Press, Inc., 539 F. 2d 1026 (4th Cir. 1976) (H. br., p. 42), as authority for permitting an award of punitive damages to a public figure. He totally ignores, however, the grave concern which each of these decisions expresses in response to the fears of the Supreme Court in Gertz v. Robert Welch, Inc., supra, regarding the "chilling effect" that punitive damages have on the exercise of First Amendment rights. This is especially so when they are awarded "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" (Id. at 350; App. br., pp. 41-43; 47, 53; Am. br., pp. 22-23). Likewise, he ignores the relatively modest amounts awarded in those cases: Buckley, $1,000, Davis, $1,500 and Appleyard, $5,000 (with $10,000 compensatory damages).* Moreover, in each of these cases there was definite evidence of common law malice (Am. br., pp. 31-33), and the jury or court awarded the punitive damages directly against the speaker (in Davis) or the author (in Buckley and Appleyard), not the publisher.

Hotchner, however, argues that the amount of his award should be measured against Reynolds v. Pegler, supra, Goldwater v. Ginsberg, 414 F. 2d 324 (2nd Cir. 1969) and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In the first place, these cases

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* In this regard, the amount of the awards in these cases (the only three appellate cases that have sustained an award of punitive damages since Gertz) deflates Hotchner's "cost of living" contention as justification for his $125,000 windfall. (H. br., pp. 48-50).

were decided long before the Supreme Court stated, in Gertz v. Robert Welch, Inc., supra, that punitive damages should bear at least a reasonable relationship to the harm inflicted (See App. br., Point VI; Am. br., Point IIA). Moreover, Hotchner's case is not in the same category as those cases. The jury awarded Hotchner $1.00 compensatory damages and he has not appealed from this award.* In Butts, as the Supreme Court noted, plaintiff Wally Butts was ruined. The Reynolds and Goldwater decisions involved (as did Buckley), notorious and long standing feuds characterized by personal animosity. In addition, Reynolds and Goldwater involved calculated attempts by the defendant to ruin the plaintiff's career. Conversely, in the Book, Hotchner is only an incidental character whom Doubleday tried to protect by toning down statements about him. Of course, the "violence and vituperativeness" of the libel published in Reynolds and Goldwater, and the effect in Butts, are unequivocally unlike the "toned down" statements found by the jury to libel Hotchner.

Certain other matters raised by Hotchner's brief with respect to punitive damages will be passed upon briefly:

On page 45 Hotchner cites Diapulse Corp. of America v. Birtcher Corp., supra. Again, this is not a First Amendment action and no Constitutional issues were involved.

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* For this reason, we will not attempt to correct his version of the facts concerning the "damages" he suffered (H. br., pp. 7-9). However, we do point out that his statement that he has had no siginificant offers to do a biography since publication of his Doris Day book (H. br., p. 8) is directly contradicted by an interview he gave Publishers' Weekly after the publication of the Doris Day book:

> "Now that it's finished, the question arises if Hotchner plans any more like it. 'I've had several calls since its come out [the Doris Day book which was published after the Doubleday Book]', he said, 'one to do a book on Betty Hutton.'" (Exhibit J, 10a) (Emphasis added)

On page 50 Hotchner claims that there was evidence before the jury concerning Doubleday's wealth. This "evidence" consisted of one long, rambling and self-serving statement which, as hearsay, had no probative value (197t).

On pages 54-56 Hotchner claims that "evidence" of his attorneys fees (about which there is no evidence in the record) provides a basis for the amount of punitive damages awarded. In support of this, the cases he cites are either from other jurisdictions or are totally inapposite (e.g., F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974)). Moreover, Russian Church of Our Lady of Kazan v. Dunkel, 67 Misc. 2d 1032, 326 N.Y.S. 2d 727 (S. Ct., Nas. Co. 1971), mod. and aff'd 41 App. Div. 2d 746, 341 N.Y.S. 2d 148 (2nd Dep't. 1973), aff'd 33 N.Y. 2d 456, 354 N.Y.S. 2d 631, 310 N.E. 2d 307, cited by Hotchner (H. br., p. 56) supports Doubleday's contention that New York law does not authorize such consideration. Finally, no evidence was presented, and the jury was never instructed concerning attorneys fees. Hotchner's citation to the footnote in Afro-American Publishing Co., v. Jaffe, 366 F. 2d 649 (D.C. Cir. 1966) (H. br., p. 55), therefore, would be irrelevant even if that case did not involve District of Columbia law.

CONCLUSION

The jury verdict returned in this action is a miscarriage of justice and is contrary to both the law and the evidence. For the foregoing reasons and the reasons set forth by Doubleday and Amicus in their main briefs, the judgment should be vacated and judgment entered dismissing the complaint with prejudice.

Respectfully submitted,

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